UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Independent Power Producers of New York, Inc.	Docket Nos.	EL13-62-001
		EL13-62-002
v.		
New York Independent System Operator, Inc.		

(Issued February 20, 2020)

GLICK, Commissioner, *concurring*:

1. Today the Commission issues a series of orders addressing buyer-side market power mitigation rules in the NYISO capacity market. Notably, none of the orders is actually focused on buyers with market power. Instead, these orders only illustrate the extent to which the Commission has perverted "buyer-side market power mitigation" in order to prop up prices, lock in the current resource mix, and attack state policies that promote clean energy. As I have previously explained, that "is illegal, illogical, and truly bad public policy."[1] Buyer-side market power mitigation should be all about and only about mitigating buyer-side market power. To extent that buyer-side market power mitigation rules apply to buyers without market power, they are *per se* unjust and unreasonable.

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2. When first introduced, buyer-side market power rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise its monopsony power to lower the capacity market clearing price. To the extent that the Commission required buyer-side mitigation of capacity market offers, it limited the mitigation to only resources that could be used effectively for the purpose of depressing capacity market prices or to resources with both the incentive and ability to depress capacity market clearing prices.[2] In short, buyer-side

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[1] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (*Calpine v. PJM*) (Glick, Comm'r, dissenting at P 1).

[2] *See, e.g.*, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34, 103-104 (2006) (discussing the buyer-side market power mitigation provisions imposed as part of the settlement that created the Reliability Pricing Model); *see also* Richard B. Miller, Neil H. Butterklee & Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity Markets: Time for a Change?*, 33 Energy L.J. 449, 460-61 (2012) (*Time for a Change?*)

market power mitigation was all about and only about the exercise of buyer-side market power.[3]

3. Over the course of the last decade, however, the Commission has abandoned that narrow focus. It now no longer requires a resource to have market power—or even any incentive to depress capacity market prices—before subjecting that resource to buyer-side market power mitigation. Minimum offer price rules (MOPR) that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decisionmaking.[4] The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the basis that it promotes competition.[5] But, in reality, the Commission is not promoting anything remotely resembling actual competition.[6]

(discussing the Commission's early approach to buyer-side market power mitigation).

[3] *See, e.g.*, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 ("The Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply."); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61211, at P 106 (2008) (explaining that buyer-side market power "mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost").

[4] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4); *see also* Miller, Butterklee & Comes, *Time for a Change?*, 33 Energy L.J. at 461 ("[B]uyer mitigation has effectively become new entrant mitigation under which all new entrants are subject to mitigation unless otherwise exempted because they have somehow demonstrated that their new facility is not 'uneconomic.'").

[5] *See, e.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 38 (discussing the Commission's finding on the need to main the "integrity of competition"); *id.* n.38 ("This Commission determined many years ago that the best way to ensure the most cost-effective mix of resources is selected to serve the system's capacity needs was to rely on competition."); *ISO New England, Inc.*, 162 FERC ¶ 61,205, at P 24 (2018) (asserting that states' exercise of their authority over generation facilities "raises a potential conflict with . . . competitive wholesale electric markets").

[6] It is also worth noting that this Commission's infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power. One example is the Chairman's premature termination of the enforcement process

4. The basic premise of market competition is that sellers should compete with each other to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the "missing money" that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.[7] That means that capacity market competition should follow a single 'first principle': Enabling resources to vie with each other to require as little "missing money" as possible in order to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly "competitive," resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. That type of competition can, in theory, produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

5. Instead of promoting that type of competition, the Commission's approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.[8] Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate[9] of what a

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regarding the nearly 1,000 percent year-over-year increase in prices in MISO Zone 4 and the Commission's failure to provide any justification for its finding that such a rate is just and reasonable. *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm'r, dissenting at PP 4-5). Another is the Commission's failure over the course of the last year to take any action on the complaints regarding PJM's Market Seller Offer Cap. Those complaints allege that PJM's current rules allow for the exercise of market power, which increased the total cost of capacity by more than a billion dollars. *See* PJM Independent Market Monitor Complaint, Docket No. EL19-47-000 at 11-12.

[7] *See, e.g.*, James F. Wilson, *"Missing Money" Revisited: Evolution of PJM's RPM Capacity Construct* 1 (2016), *available at* https://www.publicpower.org/system/files/documents/markets-rpm_missing_money_revisited_wilson.pdf (discussing the concept of "missing money" and the origin of capacity markets in the eastern RTOs); Roy J. Shanker January 10, 2003 Comments, Docket No. RM-01-12-000 (discussing the idea of missing money).

[8] *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

[9] In previous orders, the Commission has made much out of so-called unit-specific

new resource "should" cost, while existing resources are permitted to bid at a lower level.[10] In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity market tend to be disproportionately made up of new technologies and resources needed to satisfy state or federal public policies, the Commission's use of the MOPR also has the unmistakable effect (and, recently, the intent[11]) of slowing the transition to a cleaner, more advanced resource mix.

6. That type of quasi-competition does not lead to an efficient market outcome. As noted, the purpose of capacity markets is to procure the lowest-cost of bundle of resources needed to reliably provide electricity by making resources compete based on the amount of "missing money" they require to cover their costs.[12] To achieve that outcome efficiently, resources' capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly from Commission-jurisdictional markets.[13] If the market ignores some of those costs and

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exemptions, which permit a resource to bid below a default offer floor if it can convince the relevant market monitor that its estimated net going forward costs are below that floor. If the resource succeeds in that endeavor, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing.

[10] In ISO New England and NYISO, existing resources are exempt from mitigation. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 170 FERC ¶ 61,119, at P 38 (2020) (*NYPSC v. NYISO*) ("NYISO's buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones."); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 3 ("ISO-NE utilizes a minimum offer price rule, or MOPR, that requires new capacity resources to offer their capacity at prices that are at or above a price floor set for each type of resource"). The Commission's recent order in PJM applied the MOPR to existing resources, but makes them subject to a different—and generally more favorable—pricing regime than new resources. *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 2 ("[T]he default offer price floor for applicable new resources will be the Net Cost of New Entry (Net CONE) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (Net ACR) for their resource class." (footnotes omitted)); *id.* (Glick, Comm'r, dissenting at PP 32-35) (criticizing the Commission for using different offer floor formulae for existing and new resources).

[11] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

[12] *See supra* P 4.

[13] The periodic demand curve resets that occur in the eastern RTOs illustrate the

revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

7. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.[14] That is simply wrong. As explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

8. The FPA is clear. The states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity as well as practices affecting those wholesale sales,[15]

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variety of factors that go into determining the missing money. For example, consider everything that went into developing the net CONE in NYISO's most recent demand curve reset, which address factors ranging from federal, state, and local requirements related to environmental considerations, regional differences in capital and labor costs, as well differences in social justice requirements. *See* NYISO Transmittal, Docket No. ER17-386-000, Exhibit D (Analysis Group study addressing demand curve parameters). Those factors affect not only what resource you build and where you can build it, but also how you can operate that resource and, therefore, what revenues you can expect to earn and what costs you can expect to incur. Considering all those factors is necessary in order produce efficient price signals guiding when and where to cite new capacity, notwithstanding the fact that they are not derived from Commission-jurisdictional markets.

[14] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119, at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a minimum offer price rule to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support.").

[15] Specifically, as relevant here, the Commission's jurisdiction applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification."

Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy."[16] Instead, Congress gave the states exclusive jurisdiction to regulate those facilitates.[17]

9. Although those jurisdictional lines are clearly drawn, the practical reality is far messier. As the Supreme Court has observed, the FPA's spheres of jurisdiction are not "hermetically sealed:"[18] One sovereign's exercise of its authority will inevitably affect matters subject to the other sovereign's exclusive jurisdiction.[19] For example, any state regulation that increases or decreases the number of generation facilities will, through the

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16 U.S.C. § 824e(a) (2018); *see also id*. § 824d(a) (similar).

[16] *See id.* § 824(b)(1) (2018); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517–18 (1947) (recognizing that the analogous provisions of the NGA were "drawn with meticulous regard for the continued exercise of state power"). Although these cases generally deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission's role under the FPA.

[17] 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States").

[18] *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the Natural Gas Act).

[19] *See EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission "uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets").

law of supply and demand, inevitably affect wholesale rates.[20] But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation"[21] and the natural result of a system in which regulatory authority is divided between federal and state government.[22]

10. Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the FPA's dual-federalist structure. When the Commission tries to prevent a state public policy from having an inevitable, but indirect effect on the capacity market, it takes on the role that Congress gave to the states. That is true even where the Commission claims that its only "policy" is to block the effects of state public policies, not the policies themselves. After all, a federal policy of eliminating the effects of state policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

11. Moreover, as former Commission Chairman Norman Bay correctly observed, an "idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation."[23] Instead, public policy and

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[20] *Zibelman*, 906 F.3d at 57 (explaining how a state's regulation of generation facilities can have an "incidental effect" on the wholesale rate through the basic principles of supply and demand); *id.* at 53 ("It would be 'strange indeed' to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates." (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that proceeding "can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close . . . . A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.").

[21] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *id.* ("recogniz[ing] the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy").

[22] *Cf. Star*, 904 F.3d at 523 ("For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.").

[23] *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137

energy markets are inextricably intertwined.[24] Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.[25] Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a "competitive" market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission's goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition or one that is insulated from public policy.

12. And the end result will be deeply inefficient, no matter how many times my colleagues use the words "market" and "competition." The resources procured through that market will require considerably more missing money than would the set of resources procured in the absence of this kind of over-mitigation.[26] That means customers will be paying for more expensive capacity than they should. Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, the capacity markets will procure more capacity than the regions actually need and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

(2017) (Bay, Chairman, concurring at 2).

[24] As the FPA itself recognizes, "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. § 824 (2018).

[25] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 27-28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (2018) (Glick, Comm'r, dissenting at 6-9) (explaining how "[g]overnment subsidies pervade the energy markets and have for more than a century"); *ISO New England Inc.*, 162 FERC ¶ 61,205 (Glick, Comm'r, dissenting in part and concurring in part at 3) ("Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation.").

[26] That is particularly true given that the Commission permits a resource to increase its estimated costs due to state policy and environmental goals (*e.g.*, the increased fixed and variable costs associated with selective catalytic reduction, *see* NYISO Transmittal, Docket No. ER17-386-000 at 2), but not its revenue derived from state public policies or goals that may happen to be aimed at the exact same goals.

13. In addition, widespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts, especially given the ever-growing threat posed by climate change.[27] A capacity construct that ignores those states' public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the wrong types of resources or resources that are not needed at all. It is hard for me to see how a price signal that encourages redundant investment is a "competitive" or desirable outcome, much less a just and reasonable one.

14. The Commission has suggested that if it succeeds in blocking state policies, then capacity markets will become efficient little islands unto themselves.[28] But a capacity market is a means to an end, not an end in itself. It is a construct that is supposed to minimize the amount of money that customers spend on capacity in order to meet a target reserve margin.[29] A capacity market that does not serve that purpose and is "efficient" only if you disregard the fact that, in the real-world, it produces inefficient results is a market that we ought to reject out-of-hand.

15. Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should focus only on actual market power. In the event that a resource lacks buyer-side market power, its capacity market offer should not be subject to buyer-side mitigation.[30] That result is both more consistent with the FPA's dual-federalist design and the Commission's core responsibility as a regulator of monopoly/monopsony power.[31] That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated,

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[27] *See, e.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 55).

[28] *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5; *ISO New England*, 162 FERC ¶ 61,205 at P 21.

[29] *See supra* P 4.

[30] State polices that exceed the states' jurisdiction because they set or aim at wholesale rates would, of course, remain preempted. *See, e.g.*, *Hughes*, 136 S. Ct. at 1298.

[31] *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that "FERC's authority generally rests on the public interest in constraining exercises of market power").

when, and to what level.[32] In short, I believe that buyer-side market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.[33]

16. "Actual" is an important distinction here. The Commission has at times suggested that extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.[34] We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is or could be an exercise of market power fundamentally misunderstands the role of state regulation under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission's regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.[35]

17. Recently, several parties and even the Commission have argued that if we do not block state policies, prices may drop so low that capacity markets may cease to ensure

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[32] Some of the proceedings resolved by today's orders have stretched on for nearly seven years at this point. *See, e.g.*, Independent Power Producers of New York Complaint, Docket No. EL-13-62-000 (filed in May 2013).

[33] In dissents from previous Commission orders addressing MOPRs, I have also argued that the Commission's policy in those particular cases exceeded its jurisdiction because it directly targeted state policies. *E.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 7-17). I still believe that to be true. But my point today is a broader one: The Commission should altogether abandon the use of buyer-side market power regimes to address something other than actual buyer-side market, even putting aside whether the Commission's application of those regimes exceeds its jurisdiction in the first place.

[34] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at PP 37, 39; *see also N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137 (Bay, Chairman, concurring at 3) ("The MOPR is not applied to the state, which may not actually be a buyer and which is acting on behalf of its citizenry, but to the resource, which is offering to sell capacity to the market and which may be a commercial entity. The theory, in other words, assumes such a congruence of interests between the state and the resource that the resource is mitigated for the conduct of the state.").

[35] *See Hughes*, 136 S. Ct. at 1298 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates."); *see also New England Ratepayers Ass'n*, 168 FERC ¶ 61,169, at PP 41-46 (2019) (finding a state policy preempted because it sets a wholesale rate).

resource adequacy.[36] As an initial matter, there is simply no evidence that we are even remotely close to a scenario in which states policies render the capacity markets useless.[37] Although capacity prices have fallen in recent years, that has more to do with the entry of more efficient resources and excess supply (which is likely due at least in part to the mitigation regime itself), not state policies. In any case, if we ever reach a point where the only way to "save" a capacity market is to unmoor it from reality by blocking state policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-world outcomes or the Commission usurping the role that Congress reserved for the states.

18. Indeed, the Commission's efforts to "save" capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. One need look no further than New York, where the Public Service Commission has begun a proceeding to consider "taking back" from NYISO the responsibility for ensuring resource adequacy. The Commission's overreach in today's orders will no doubt create greater momentum in that direction.

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19. Turning to the merits of this specific order, I concur because it affirms the Commission's decision not to extend NYISO's buyer-side market power mitigation rules to resources retained pursuant to a Reliability Support Service Agreement (RSSA). As explained above, buyer-side market power mitigation should apply only to buyers with market power. This record does not indicate that any of the resources retained pursuant to an RSSA are buyers, much less buyers with market power. Accordingly, I agree with the conclusion that no further mitigation is appropriate.

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[36] *E.g.*, *ISO New England*, 162 FERC ¶ 61,205 at PP 21, 24; *see Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (asserting that state policies compromise the "integrity" of the capacity market); *see* Calpine Complaint, Docket No. EL16-49-000, at 31-32.

[37] *Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (Glick, Comm'r, dissenting at 9-11).

20. In addition, I support the Commission’s adoption of Dr. Patton’s theory that these units would be economic if they were compensated for their local reliability value.[38] As explained above, capacity resources receive revenue for a variety of factors that are not reflected in the capacity market, or even Commission-jurisdictional markets more generally, but that should be considered in evaluating whether a resource is economic. Because I understand today’s order to be consistent with that principle, I join it in full.

For these reasons, I respectfully concur.

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Richard Glick
Commissioner

[38] N.Y. Indep. Sys. Operator, 170 FERC ¶ 61,118, at PP 19, 22 (2020).